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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

Public Copy

File: [REDACTED]

Office: HELENA, MONTANA Date:

28 NOV 2001

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

Application: Petition to Classify Orphan as an Immediate Relative Pursuant to Section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(F)

IN BEHALF OF APPLICANT:

SELF-REPRESENTED

to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Helena, Montana, initially approved the immigrant visa petition. Based upon an investigation conducted by the Officer-in-Charge, Ho Chi Minh City, Vietnam, the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director served the petitioner with notice of his intent to revoke the petition and the petition was ultimately revoked on May 22, 2001. The matter is now before the Associate Commissioner for Examinations on appeal. The petition will be remanded to the director to treat the appeal as a motion.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) on May 15, 2000. The petitioner is a 37-year-old married citizen of the United States. The beneficiary is 13 years old at the present time and was born in Thanh Pho-Can Tho, Hau Giang, Vietnam on August 27, 1988.

The director denied the petition after determining that the beneficiary did not meet the statutory definition of "orphan." On appeal, the petitioner submits a statement and additional evidence. The petitioner asserts, in part, that the biological mother, who is the surviving parent, is unable to provide proper care to the beneficiary, consistent with the local standards in Vietnam.

Revocations of approved petitions are governed by 8 C.F.R. part 205. According to § 205.2(d), a petitioner has 15 days after the service of notice of the revocation to appeal the director's decision. The record reflects that the director sent his May 22, 2001 decision to the petitioner at the petitioner's address of record; the director received the petitioner's appeal 31 days later on June 22, 2001.

It is noted that in the revocation notice, the director erroneously informed the petitioner that he had 30 days (33 days if received by mail) to appeal the decision. Unfortunately, the director's error cannot supercede the regulation, which provides for a 15 day timeframe in which to appeal a decision to revoke an approval of a petition.

Pursuant to 8 C.F.R. 103.3(a)(2)(v), an appeal which is not filed within the time allowed must be rejected as improperly filed; however, if an untimely appeal meets the requirements of a motion to reopen as described in §103.5(a)(2), or a motion to reconsider as described in §103.5(a)(3), the appeal must be treated as a motion, and a decision must be made on the merits of the case.

8 C.F.R. 103.5(a) states, in pertinent part:

(2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence.

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The petitioner's statement and evidence submitted on appeal meets the requirements of a motion to reopen. Accordingly, the matter will be remanded to the director to consider the petitioner's new evidence. The director may request any additional evidence deemed necessary to assist him in determining whether the criteria outlined in 8 C.F.R. 204.3(d)(1) have been met. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the Associate Commissioner for review.